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THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 677.

CONTINENTAL BAKING COMPANY, a corporation; GENERAL BAKING COMPANY, a corporation; SCHULZE BAKING COMPANY, a corporation, and CARL WILKE, doing business as the WILKE BAKING COMPANY, APPELLANTS,

vs.

HARRY H. WOODRING, as Governor of the State of Kansas; ROLAND BOYNTON, as Attorney General of the State of Kansas; JESSE W. GREENLEAF, THURMAN HILL and CHARLES W. CAMPBELL, as members of the Public Service Commission of the State of Kansas, APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF OF APPELLEES.

ROLAND BOYNTON,
WALTER T. GRIFFIN,
CHARLES W. STEIGER, and
EARL H. HATCHER,
Solicitors for Appellees.

KELLEY BRIEF PTG. CO. TOPEKA

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BRIEF OF APPELLEES.

I.

OPINION OF COURT BELOW.

The opinion of the statutory three-judge Federal Court for the District of Kansas, First Division, appears as Continental Baking Co. et al., v. Woodring, Governor

of Kansas, et al., in 55 Fed. (2d) 345, and the opinion is in the printed record of this case beginning at page 26. The decree is found at page 46 of this record.

II.

STATEMENT.

This appeal is from an order and decree (R. 46) of a statutory three-judge court for the District of Kansas, consisting of George T. McDermott, C. J., Franklin E. Kennamer, D. J., and Richard J. Hopkins, D. J.

The decree denied the application of appellants for temporary injunction and dismissed the cause. The matter was submitted upon the issues joined by the bill of complaint (R. 1) and the motion to dismiss the bill of complaint. (R. 21)

The appellants by their bill of complaint pray that the appellees be enjoined from enforcing Chapter 236 of the Laws of Kansas for 1931.

Chapter 236 of the Laws of 1931, places a special tax, based on truck capacity and mileage, upon carriers which carry for hire and upon those engaged in transportation by motor vehicle of property sold in furtherance of any commercial enterprise. (R. 11.) Such taxes must be used for maintenance, repair and construction of public highways, and the administration of the act. The act requires public carriers to secure a certificate of convenience before doing intrastate business; it requires all carriers to procure a license and to carry liability insurance; it authorizes the Public Service Commission

to promulgate rules and regulations looking to the safe operation of the vehicles of all carriers.

Section 1 of Chapter 236 of the Laws of 1931, classifies motor carriers as "public motor carriers of property", "contract motor carriers of property", "private motor carriers of property", "public motor carriers of passengers" and "contract motor carriers of passengers". (R. 11 and 12).

The three classifications of motor carriers pertaining to carriers of property are defined as follows:

> "The term 'public motor carrier of property' when used in this act shall mean any person engaged in the transportation by motor vehicle of property for hire as a common carrier having a fixed termini or route."
>
> "The term 'contract motor carrier of property' when used in this act shall be construed to mean any person not a public motor carrier of property engaged in the transportation by motor vehicle of property for hire as a business."
>
> "The term 'private motor carrier of property' when used in this act shall be construed to mean any person engaged in the transportation by motor vehicle of property sold or to be sold by him in furtherance of any private commercial enterprise."

That the appellants fall within the classification of "private motor carriers of property" is not disputed. All of the appellants are engaged in the manufacture of bread and other bakery products in plants owned by them. Some are located within and some without the State of Kansas, and such bakery products are delivered in the State of Kansas by the appellants in their

own trucks from plants located within and outside the state.

The appellees' motion to dismiss the bill of complaint was heard on October 10, 1931; on the 6th day of January, 1932, the court entered a decree dismissing the bill of complaint, dissolving the temporary restraining order theretofore issued and denying the appellants the relief prayed for.

Previously a similar attack was made upon the same statute by a "contract carrier for hire" and the statute was held to be good as against that attack by the District Court of Kansas, Judges Phillips, Symes and Hopkins sitting (Louis v. Boynton, 53 Fed. (2d) 473).

III.

SUMMARY OF ARGUMENT.

In General.

Chapter 236, Kansas Laws of 1931, is the result of the legislature's endeavor to protect the state's investment in its highway system, to safeguard the persons and property of all classes of users of the highways, and to secure compensation from those commercial users receiving greatest benefit from such highway system.

In making provisions to effect these purposes, the legislature gave consideration to its knowledge of traffic upon the highways and the extent of use of and benefits derived from highways by different classes of carriers, and also to provisions which would be practical in operation and administration.

The legislature attempted to produce a comprehensive bill, which carefully distinguished private carriers, contract carriers for hire, and common carriers. The statute clearly defines three general plans: One for the control of common carriers, one for the control of contract carriers for hire, and the other for the control of private carriers.

If the exceptions and exemptions are tested by their general application to the classes affected, and not by such hypothetical cases as are suggested by counsel for appellants, practical equality will result.

Smith v. Cahoon Distinguished

The appellants rely principally on Smith v. Cahoon, 283 U. S. 553. We do not believe that this case is controlling as to the constitutionality of the statute. The Cahoon case was an appeal from the Supreme Court of Florida, which had denied a writ of habeas corpus to the appellant. The Florida statute undertook to exempt such carriers for hire as were engaged in the transportation of agricultural, horticultural and piscatorial products, thus attempting to distinguish between public carriers who were engaged in transportation for hire and who were all habitual and continuous users of the highways, on account of the nature of the product carried. The appellant had been arrested for operating a truck without a license and on appeal the law was held unconstitutional on the ground that to distinguish between two public carriers for hire because of mere difference in class of product carried was unconstitutional. The

statute also contained provisions which could only be applicable to common carriers and others which could be applicable to all carriers, but these provisions were hopelessly intermingled. The statute had not been construed when the appellant was arrested and the question was whether or not the appellant could be restrained of his liberty for violating the statute, when its terms were obscure and had not yet been construed. The Supreme Court released the defendant with the statement that, "It should be observed that this is not an action in equity where the enforcement of the statute awaits the final determination of the court." The present case is such an action. The provisions of the Kansas statute are not hopelessly intermingled as the Florida statute. The statute has been construed and nobody is deprived of his liberty. For these reasons we do not believe that the Cahoon case controls this case.

1. Admission of bill of complaint and presumption of validity.

The truth of all well pleaded allegations of appellants' bill of complaint is admitted by the appellees' motion to dismiss, and the cause is submitted to this court on such allegations and matters of judicial notice.

The burden is upon the appellants to overcome the presumption of validity of the statute. (Munn v. Illinois, 94 U. S. 113.)

2. The exemption of motor carriers who operate wholly within a city or village.

The exemption of motor carriers who operate wholly within a city or village from the tax is justified because the tax does not go to the construction or maintenance of city or village streets generally, and because such streets are kept up and maintained by local taxation to which such exempted carriers contribute.

In connection with this exemption the act imposes the tax upon those carriers who use the rural highway system to which the tax revenues go, and exempts those carriers who do not secure direct benefit from such rural highway system. (Louis v. Boynton, 53 Fed. (2d) 473; State v. Kozer, 116 Ore. 581.)

The exemption from the liability insurance and regulatory requirements of motor carriers who operate wholly within a city is justified because such carriers are subject to regulatory municipal ordinances. The operations of carriers who do business wholly within a village are so circumscribed as not to require such regulation.

3. The exemption of private carriers who operate within a radius of twenty-five miles beyond the corporate limits of a city or village.

This provision gives to all private carriers an area with a radius of twenty-five miles beyond the corporate limits of their city or base, which is free from the tax and insurance and regulatory provisions. As to this area, all private carriers are treated alike.

The exemption is justified because of the impracticability, from an administrative standpoint, of attempting to tax and regulate the myriad of small local operators. The scope of operations is a proper basis of classification. (Chicago R. I. & P. R. Co. v. United States, 76 L. Ed. 93.) The privilege of engaging in business over a wide area is more valuable than that of engaging in business over a small area. (Clark v. Maxwell, 197 N. C. 694, affirmed—Clark v. Maxwell, 282 U. S. 811; State v. Kozer, 116 Ore. 581.) Those whose operations are limited to the twenty-five mile radius are subject to local taxation for the upkeep of the roads used by them, but this is not the situation as to operators hauling over long distances.

Private carriers doing business in the local twenty-five mile area, commonly use the less travelled county and township roads, while the through carriers in general use the improved state highway system, upon which the denser traffic and the higher speed cause greater danger of injury. This condition justifies the liability insurance and regulatory measures where the risk and need are greatest. (Patsone v. Pennsylvania, 232 U. S. 138.)

4. The exemption of transportation of livestock and farm products to market by the owner, or supplies for his own use in his own motor vehicle.

The transportation of farm products and livestock so far as carried on by the owner thereof, is distinguished from the transportation operations of other private car-

riers by its seasonal and incidental nature. Commercial enterprises, whether mercantile, factory, or mine, usually have a practically continuous output and the transportation of such products occasions a rather regular and persistent use of the highways. In this respect the transportation of livestock and farm products to market by the individual owner (usually the producer) is clearly distinguished. It is carried on over short distances, and commonly over the lesser used county and township roads, and covers a small number of days in each year.

To require a liability insurance policy and enforce regulatory provisions as to each of the vast number of such minor carriers would be a work of great administrative difficulty, and out of proportion to the results that could be accomplished. (State v. LeFebvre, 174 Minn. 248; State v. Kozer, 116 Ore. 581; Iowa Motor Vehicle Association v. Board of Railroad Commissioners, 207 Iowa 461, affirmed by the United States Supreme Court under same title, 280 U. S. 529.)

A regulation, in other respects permissible, is not unconstitutional as denying equal protection of the laws because it does not reach every class to which it might be applied, where it strikes at the evil where it is felt. (Silver v. Silver, 280 U. S. 117.)

5. Exemption of the transportation of children to and from school.

The transportation of children to and from school by motor carriers is a public service and conducted at public expense for public welfare. The state has a

right to exempt such transportation from the tax provisions of the act.

The school authorities have control of the transportation of pupils, and may properly be depended upon to make proper provisions for safe operation on the highways. (Louis v. Boynton, 53 Fed. (2d) 473; Minnesota v. LeFebvre, 174 Minn. 248.)

6. Do Sections 2, 17, 19, 23 and 24 impose obligations upon appellants to which the state had no constitutional authority to subject them, or fail to define such obligations with a fair degree of certainty?

Under this heading in the brief proper we take up and discuss the several sections referred to, and arrive at what we believe to be a reasonable construction without any great difficulty.

Appellants' statement that if they fail to correctly construe any of the above provisions of the act, they are subject to arrest and prosecution, appears to be unwarranted. Upon their own statements, they are all private carriers who operate beyond the limits of any city or village and beyond the exempted twenty-five mile radius. They are, therefore, required to apply for and secure licenses and to pay taxes. Having taken out the licenses, they are at liberty to use any of the highways in Kansas and are not subject to prosecution therefor. In case of a bona fide error in the computation of the amount of tax due from them, it is not to be assumed that they will be prosecuted without opportunity to secure a construction of the law. In fact, the court below has already given a construction.

7. Powers given the Public Service Commission by Sections 5, 8, 16, 17, 19, 22 and 23.

Appellants' chief objection under this subdivision is that the last sentence in Section 5 makes private motor carriers subject to the same duties and liabilities as common carriers. Under a reasonable and logical construction of the section, the laws relating to the powers and duties and jurisdiction of the Public Service Commission over common carriers are made applicable to common motor carriers only. Even if a literal construction of the statute would bring the absurd and unconstitutional result claimed by counsel for the appellants, it should be avoided, because a construction which is reasonable and in accord with the legislature's purpose can be found. (United States v. Ryan, 76 L. ed. 71.)

8. The provisions of Section 21 requiring a liability insurance policy conditioned to pay compensation to injured persons or damage to property resulting from negligent operations.

This provision is properly construed to apply only to indemnification of other users of the highways for injuries caused by negligent operation of the licensed carriers. It does not require contract or private carriers to carry insurance covering damages to their passengers or cargo. Appellants being carriers of their own goods only, clearly would not be subject to such requirement; and so construed, it is valid. (42 C. J. 710; Re Opinion of Justices, 81 N. H. 566.)

IV.

ARGUMENT.

In General.

Faced with the necessity of protecting the highways of Kansas and the people on them from the dangers of unrestrained commercial vehicle operations, and of securing to the people of the state a safe and dependable system for the transportation of freight and passengers on the highways, the legislature enacted the statute now under discussion.

The State of Kansas has at a great expense constructed a system of improved highways. These highways have been built and maintained at great expense. The burden has been borne in part by special benefit districts, in part by tax on gasoline sold in the state, and in part by license fees exacted from all resident owners of automobiles. These improved highways have now become the road beds of transportation companies which are actively and seriously competing with railroads which provide their own road beds. The free use of highway systems for transportation purposes is having a far reaching effect upon established common carrier transportation service by rail.

The improved highway systems are being used by concerns such as plaintiffs for the daily delivery of their products to every city and village in the state.

Commercial motor carriers are already using main highways of the state system to such an extent as to jeopardize the safety of those using private passenger

automobiles thereon, and deter and interfere with their lawful use. The situation becomes worse with the passage of time, due to the increasing number of commercial vehicles, and the faulty manner in which many of them are equipped and operated.

The highways of the state are being destroyed by these trucks, which combining weight and speed, make the maintenance of the highways an increased burden to the state.

The purposes which the legislature had in mind in the passage of the present law were to require those who daily use the highways for commercial purposes to pay an additional tax for their maintenance and upkeep, and to provide such regulation as was necessary for the safety of others.

As stated in the opinion of the court below, "the amount of charges and the method of collection are for the state to determine so long as they are reasonable and conform to some fair and practical standard." (R. 28.)

The legislature in drafting the statute attempted to produce a comprehensive bill which carefully distinguishes between private and common carriers. The statute clearly discloses two general plans, one for the control of public carriers and the other for the control of private carriers. When the law is construed as applicable to the general classes affected, practical equality results. The validity of the law is to be determined with respect to the practical problems confronting the legislature and not in the light of theoretical or imag-

inary discriminations which may be advanced. This matter was well covered in the opinion of the court below in which it said:

> "As in the case of most legislation which is the subject of wide interest and which is amended on the floor and in conference, many questions of construction are raised. Counsel for the plaintiffs make many suggestions which would improve the draftsmanship of the bill, as doubtless they will be able to do as to any bill that may be later enacted. We are not aided in our efforts to construe the law by the hypothetical absurdities which are suggested by counsel and which have come to be the conventional method of presenting constitutional questions, for, as was said by the Supreme Court of Oregon in State v. Kozer, 116 Ore. 581, 242 Pac. 620, the constitutionality of a statute cannot be tested by isolated cases conjured by fertile imagination; it must be tested by 'its general application to the classes affected, and not to certain individuals belonging to such classes. Exact equality is not possible. Practical equality is constitutional equality. The human mind has not yet been able to devise any scheme of taxation which will operate with unerring certainty and equality to all situations which may arise." Southwestern Oil Co. v. Texas, 217 U. S. 114; Bell's Gap R'd Co. v. Penn., 134 U. S. 232. (R. 28-29.)

For an act of this nature to be valid, the legislature is not required to have covered the whole field of abuses, within the rule laid down in Hall v. Geiger-Jones Co., 242 U. S. 539, and St. Louis, I. M. & S. Ry. Co. v. Arkansas, 240 U. S. 518, quoted from hereinafter at pages 24 and 25.

Smith vs. Cahoon Distinguished.

The appellants in their brief cite a number of cases laying down fundamental principles of constitutional law with which appellees have no argument. We do not believe, however, that the principles as pronounced in those decisions are in any way violated by the provisions of the act now in question.

The appellants place much emphasis upon the case of Smith v. Cahoon, 283 U. S. 552. This case is cited as authority for the appellants' contentions some twenty-seven times in their brief. It appears, therefore, as stated by the court in the case of Stephenson v. Binford, 53 Fed. (2d) 509, that the carriers have again in their efforts to avoid paying for the use of the highways, and to prevent regulation by the state, taken as their shibboleths, the pronouncements of the Supreme Court in the case of Smith v. Cahoon.

The appellees do not believe that it was the intention of the Supreme Court in that case to lay down a rule which would prevent the states, under a properly constructed statute, placing upon those using the highways for commercial purposes, such regulations as were necessary for the protection of the general public, and collecting from such transport haulers a reasonable fee for the use of the improved roads. The Smith v. Cahoon case is recognized in the opinion of the court below and carefully distinguished on what we believe to be a sound basis. In its opinion, the court below said:

> "The plaintiffs rely principally upon Smith v. Cahoon, supra. That was an appeal from the Su-

preme Court of Florida, which had denied a writ of habeas corpus to the appellant. The appellant had been arrested for operating a truck without a license. The statute undertook to exempt such public carriers as were engaged in the transportation of agricultural, horticultural and piscatorial products. To thus distinguish between two public carriers, each of which is engaged in transportation for hire, and each of which was a habitual and continual user of the highway, on account of the nature of the product carried, was held to be unconstitutional. Moreover, the statute contained provisions which could legally be applicable only to common carriers, and other provisions which could be applicable to all carriers, but these provisions were intermingled. When the appellant was arrested, the statute had not been construed. The question to be determined was whether or not the appellant could be restrained of his liberty for violating the statute, the terms of which were obscure, and which had not been construed by the courts. He was released. But the Supreme Court stated, 'It should be observed that this is not an action in equity where the enforcement of the statute awaits the final determination of the court as to validity and scope.' The present case is such an action. The Supreme Court further said that, 'until such separation has been accomplished by judicial decision,' the statute remained uncertain. But the provisions of the Kansas statute are not so hopelessly intermingled as the Florida statute; and in the second place, the statute has now been construed and nobody is deprived of his liberty. We do not believe that the Cahoon case controls this case." (R. 44.)

The Kansas act carefully distinguishes and classifies common carriers, contract carriers for hire, and private carriers engaged in the transportation by motor vehicles

of property sold in furtherance of any commercial enterprise. There is no attempt in the statute to make common carriers out of contract carriers for hire, or private carriers.

The Florida act applied only to those persons operating motor vehicles "used in the business of transporting persons or property *for compensation,* or as a common carrier," and expressly eliminated from its provisions "any transportation company engaged exclusively in transporting agricultural, horticultural, dairy or other farm products and fresh and salt fish and oysters and shrimp from the point of production to the assembling or shipping point en route to the primary market *** " It is therefore clear that the Florida act did not at all relate to those persons who were engaged in transporting their own goods over the highways, and that the attempted exemption was of carriers for hire (or contract carriers) of certain classes of goods, namely, agricultural and sea food products, while not permitting the same privilege to like carriers for hire of other classes of goods.

The exemption of the Kansas act under consideration, so far as it applies to agricultural products, is limited to "the transportation of livestock and farm products to market *by the owner thereof,* or supplies for his own use *in his own motor vehicle;* *** " Under this act only the actual owner of farm products is exempted.

Considering first the provisions of the Florida act, it is our view that a carrier *for hire* of agricultural products or sea foods will be engaged in that business as a

regular industry and will so arrange his trucking activities as to secure the largest volume of business and the greatest income; that is, he makes his place of business on the public highway and makes himself substantially a regular and continuous user of the highways, practically as much so as a common carrier or a carrier for hire of any other goods. Appellees concede that the carrier *for hire* of agricultural products will use the highways to substantially the same extent as the carrier for hire of other raw materials or manufactured articles, and think that the Supreme Court's decision was the only one justified by the facts as to the attempted classification.

Now considering the Kansas agricultural exemption, which is limited to transportation by the owner of produce to market, we see a substantially different situation as relates to the extent of use of the highways by the carrier. The producer of farm products is engaged primarily and for the greater bulk of his time upon his own lands and only incidentally and occasionally uses the public highways for the marketing of the comparatively few crops that he will raise during the year. His use of the highways is insignificant as compared with the use by other carriers of their own goods. A mercantile organization distributing its own goods will use the highways daily and continuously; likewise a manufacturer or a mine operator has a continuous output, and the use by them of the highways in distributing goods will be practically continuous.

For these reasons, it is appellees' view that the lack

of a reasonable basis for the exceptions that obtained in the Florida case does not exist as respects the Kansas act now considered. Appellees think the views taken by state supreme courts hereinafter referred to, to the effect that the use of the highways in marketing agricultural products by the owner is a minor use, justifying a separate classification, are well taken, and are not in conflict with the United States Supreme Court decision in the Cahoon case.

1. Admissions of bill of complaint and presumption of validity.

Appellees agree with appellants' statement that the motion to dismiss admits the truth of all well pleaded allegations of the bill of complaint. The cause is before this court upon the allegations of the bill and the facts of which the court takes judicial notice. Some of these facts are referred to in the opinion of the court below.

It is also true that the presumption is in favor of the validity of the statute, and the burden is upon the appellants to overcome this presumption.

The rule is well stated in the case of Munn v. Illinois, 94 U. S. 113, in which Chief Justice Waite, speaking for the court, said:

> "Every statute is presumed to be constitutional. The court ought not to declare one unconstitutional unless it is clearly so. If there is doubt, the express will of the legislature should be sustained." (p. 123.)

2. The exemption of motor carriers who operate wholly within a city or village.

The appellants complain that under the Kansas act being considered no tax is imposed on trucks operated wholly within a particular city or village, while they must pay the tax upon all mileage operated by their trucks within the same city.

The exemption from the payment of tax within a city or village applies only to the base city or village within which the truck operates, and does not exempt any carrier from the tax while operating within any other city or village. Appellants could operate wholly within a particular city or village if they desired, or they could allocate certain trucks to a certain city or village, and thereby secure exemption under this clause. It appears however from their allegations that they choose to have their several trucks do both city and country transportation. By so doing they secure for each truck a more extensive use of the highways and put their operations in a different class from those of carriers who operate entirely within any city or village.

The justification for the tax is compensation for the use of the highway. After deduction of what is required for the administration of the act, all the rest of the tax goes to the construction, repair and maintenance of the state highway system, including those individual city streets which have been designated as a part of the system, and county and township roads. No portion of the tax is used for city and village streets generally which are not portions of the state highway system.

It appears clear that operators engaged as are the appellants in the distribution of their products as manufacturers, will in general when passing through a city or village, use the connecting highways and connecting streets which are part of the state highways, and have the benefit of the portion of the tax that is expended on city streets. On the other hand, those operating wholly within any city or village, and consequently exempt from provisions of this act, will use the various streets and alleys indifferently in the conduct of their businesses, and receive little direct benefit from this tax.

Furthermore, the local carriers who confine their operations exclusively within one city or village will, as a rule, be subject to general property taxes, automobile license fees, motor vehicle fuel taxes and possibly municipal license fees, part or all of which are devoted to local street construction and maintenance.

In consequence there is no requirement of justice or fairness that those carriers who are now exempted because of operating wholly within a city or village, and who are subject to property and city license taxation for maintenance of the city streets, should be specially taxed for the upkeep of the general highway system which they do not use.

Because of these circumstances, we feel that the legislature had a just and reasonable basis for exempting those carriers who use only streets of a particular city or village.

The appellants' chief objection to the city exemption seems to be that they are not located in a city within

the state so as to be entitled to the exemption. The statute has no extra-territorial force and does not reach them in the city in which they have their base, so there is no occasion for the exemption as to them. Their objection on this ground would appear to be unfounded.

The views expressed above were followed by the court in the case of Louis v. Boynton, et al., 53 Fed. (2d) 473, in which the court said:

> "Eighty percent or more of the tax is to be used to create a fund for reconstruction of highways. Such fund will be entirely expended outside of the corporate limits of cities and villages. It is obvious, therefore, that motor carriers operating wholly within a city or village will not receive any direct benefit therefrom, and just reason exists for exempting them from the tax."

In State v. Kozer, 116 Ore. 581, the Oregon court held that it was proper to measure the amount of the tax by the extent of the use of the highways, and to exact higher fees of owners who are given the privilege of operating their vehicles over a greater extent of highways.

> "The power to prescribe what property shall be taxed implies the power to prescribe what property shall be exempt; and, in the absence of a special constitutional provision to the contrary, the legislature may exempt such classes of property from taxation as, in its opinion, the public policy of the state requires." (26 R. C. L. 297.)

This tax being an excise rather than a general prop-

erty tax, it is not subject to the constitutional provision requiring uniform and equal assessment.

Appellants next object to the exemption on the ground that carriers operating wholly within a city or village are not subject to the regulatory, public safety and indemnity features of the act, while appellants are subject to these features if they operate into and thru such city or village. We find a substantial basis for this distinction. The cities are empowered by state law to enact and enforce regulations to meet their various needs and to protect the interest of the public. It is presumed that they will do so as to such carriers as operate exclusively within their limits, and for this reason are not within the regulatory provisions of the act.

Where carriers operate wholly within a city and are not within the provisions of this act, we believe it is clear that a city may provide its own safety measures and it is not prohibited from so doing by the provision in Section 21 of the Act that "no other or additional bonds or licenses than those prescribed in this act shall be required of any motor carrier by any city, town, or other agency." This provision applies only to carriers who are required to have license under the provisions of the act.

This provision is for the benefit of carriers engaged as are appellants. Except for it, they might be obliged to comply with both local city regulations and the provisions of the state act.

In addition to the justifiable reasons which we think the legislature had for exempting operators wholly

within a city, or within a radius of twenty-five miles beyond, from the regulatory provisions, we believe that a state may direct its laws against what it deems an evil as it actually exists, without covering the whole field of possible abuses.

This principle has been enunciated by this court in numerous cases. In Patsone v. Pennsylvania, 232 U. S. 138, Justice Holmes stated:

> "We start with the general consideration that a state may classify with reference to the evil to be prevented, and that if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be picked out. A lack of abstract symmetry does not matter. The question is a practical one, dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named. Lindlsey v. National Carbonic Gas Co., 220 U. S. 61, 80, 81, 55 L. ed. 369, 378, 379, 31 Sup. Ct. Rep. 337, Ann. Cas. 1912 C. 160. The state 'may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses.'"

In later cases, the Court has said:

> "A state may direct its law against what it deems the evil as it actually exists, without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed." Hall v. Geiger-Jones Co., 242 U. S. 539.

"We have recognized the impossibility of legislation being all comprehensive, and that there may be practical groupings of objects which will as a whole fairly present a class of itself, although there may be exceptions in which the evil aimed at is deemed not so flagrant." St. Louis, I. M. & S. R. Co. v. Arkansas, 240 U. S. 518.

3. The exemption of private motor carriers who operate within a radius of 25 miles beyond the corporate limits of such city or village.

Careful consideration should be given this exemption to determine whether or not a new class is created by it or whether it simply creates an exempt area for all persons operating in the class of private carriers. In the administration of the act the Public Service Commission has construed this exemption as an exemption or exception granted to all private carriers and not as creating a new class. So long as private carriers operate within a radius of 25 miles of their home city or base they are not subject to the payment of the fee. Even though they have made trips outside the 25 mile radius, which subjects them to the law and to the payment of tax for such trips, they are still not subject to the payment of a tax for trips made entirely within the 25-mile zone. Under this construction all private carriers are placed upon an equal footing. So long as they operate within a radius of 25 miles, no private carriers are subject to the tax. When any trip is made beyond the 25-mile limit, all private carriers are subjected to the payment of the tax on such trip. This construction

eliminates all discrimination, as all private carriers are treated alike, both within and without the 25-mile zone.

It is a matter of judicial notice that this exemption was not in the bill as presented to the legislature by the highway committee, but was written in on the floor of the house. It must be presumed that the legislature had in mind good reasons for the change, including the fact that operations within a radius of 25 miles are not chiefly on improved highways, but are largely upon township and county roads. We also call to the attention of the court that a large part of the improved highway system has been built under the benefit-district plan and that a great many of the users of the highways wholly within the 25-mile radius have been heretofore called upon to pay a large amount for the construction and maintenance of those highways, and that they have heretofore paid more than their proportionate share for the use thereof. The legislature must have also had in mind that persons operating within 25 miles of their home base, contributed heavily through property taxes, for the maintenance and upkeep of the highways within that limit.

It is elementary law that in construction of a tax statute the court will take into consideration the conditions, benefits and protections which the legislature had in mind when the act was passed, and look into the motive which actuated the legislature when the exemption was made.

> "The legislature can make any classification or subclassification which is reasonable and not arbi-

trary. It is within the power of the general assembly to make one general class of persons engaged in a particular business, for the purpose of taxing their occupation; and it may constitutionally make for this purpose a more limited class composed of persons engaged in the same occupation in a particular way. The fact of the exemption of certain persons from the operation of the tax imposed upon a class does not destroy the uniformity required by the above provision of the constitution, provided the exemption is not arbitrary and is based upon some good reason." (Southern Transfer Co. v. Harrison, 171 Ga. 358.)

In the case of State ex rel. v. Kozer, 116 Ore. 581, the court considered and upheld the kind of classification involved here—in that case an area within five miles beyond the limits of cities or towns. The Oregon statute, there considered, imposed an additional license fee upon all motor vehicles, exclusive of common carriers, which were used for commercial purposes in selling and delivering goods outside incorporated cities or towns and in excess of five miles beyond the boundaries of such cities or towns. The court held this exemption not invalid as for arbitrary classification. The propriety of the additional fee was predicated upon the greater use of the highways secured by those subject to the additional tax. The Oregon court, in its opinion, quoted Mr. Justice McKenna of this court in Mutual Loan Company v. Martell, 222 U. S. 225, as follows:

"We have declared so often the wide range of discretion which the legislature possesses in classifying the objects of its legislation that we may be excused from a citation of the cases. We shall only

repeat that the classification need not be scientific nor logically appropriate, and if not palpably arbitrary and is uniform within the class, it is within such discretion."

The Oregon court further said in the opinion:

"In determining whether the classifications in question are reasonable, it is important to give due consideration to the general purpose and spirit of the Oregon motor vehicle laws. It is apparent, even from a casual reading of the same, that the legislature intended to impose upon those who most use the public highways of this state the greatest part of the burden of repairing and maintaining them. This policy, as a matter of abstract justice, is unquestionably sound. It requires the person who causes the most wear and tear on our highways, which are maintained at great expense, to assume a just part of this public burden." (Page 588.)

At pages 29 and 32 of their brief, appellants contend that any exemption, based on area or distance between termini, would be arbitrary and void; and on page 30, they state that if it was the intention of the legislature to exempt the small user on the basis of the cost of administration, then the only method justified would be to exempt so many miles of operation. But would such an exemption be practicable? What means would the State have of determining the total mileage of each carrier in the event that he failed to disclose the information? We think that the classification, based upon area covered, adopted by the legislature, was a reasonable and practical one. Appellants say that in the case of Clark v. Maxwell, 197 N. C. 694, the exemption was based upon

the distance traveled. An examination of this case will show that this view is based on a misconception of the statute there under consideration. That statute gives to those engaged in the transportation of property between termini, less than fifty miles apart, a lower rate of tax than was imposed upon persons engaged in such transportation between termini more than fifty miles apart. The classification was not based upon actual miles traveled. In its opinion, the Court said:

> "The privilege of engaging in the latter business is more valuable than the privilege of engaging in the former business only. The service furnished by the state to the former is less expensive than the service furnished to the latter. It cannot be said that it is unjust for the state to require a larger license tax to be paid by the licensee who acquires by his license the more valuable privilege, at a greater cost to the state. *** In Brown-Forman Co. v. Kentucky, 217 U. S. 563, 54 L. Ed. 883, it is said: 'A very wide discretion must be conceded to the legislative power of the state in the classification of trades, callings, businesses or occupations which may be subjected to special forms of regulation or taxation through an excise or license tax. If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law'. Upon these principles, it must be held that the statute involved in this action is not in violation of the provisions of section 1 of the fourteenth amendment of the constitution of the United States."

On January 19, 1931, the above decision was affirmed by the United States Supreme Court in a *per curiam* opinion as follows:

"The judgment herein is affirmed. (Carley & Hamilton, Inc. v. Snook, 281 U. S. 66, 72, 73, 50 S. Ct. 204, 74 L. Ed. 704, 68 A. L. R. 194; Packard v. Banton, 264 U. S. 140, 143, 144, 44 S. Ct. 257, 68 L. Ed. 596; Clark v. Titusville, 184 U. S. 329, 332, 333, 22 S. Ct. 382, 46 L. Ed. 569.)" (Clark v. Maxwell, 282 U. S. 811, 75 L. Ed. 262, 51 S. Ct. 211.)

In Carley & Hamilton v. Snook, 281 U. S. 66, 72, the court said:

"That the legislature may graduate the fees according to the propensities of the vehicles to injure or destroy the public highway and may exempt those with respect to which this tendency is slight or non-existent, cannot be doubted. *** It is for the legislature to draw the line between the two classes."

In line with the above decision is the consideration that the amount of tax to be realized must justify the cost and expense of collection. On minor transportation operations the legislature is justified upon this ground in creating an exemption, and the 25-mile limitation affords a proper way of fixing the line.

A recent case, that distinctly recognizes the propriety of a classification predicated upon difficulty of administration and accounting is Chicago, R. I. & Pac. R. Co. v. United States, 76 L. Ed. 93, 52 S. Ct. 87 (decided November 23, 1931). There railroads of less than 100 miles length were exempted from certain features of the car-rental order of the Interstate Commerce Commission; this exemption was sustained because it relieved the small carriers "from the burden of keeping account of a mul-

titude of separate per diem charges, and reporting them separately to the various trunk lines".

It would appear that if all private carriers are exempt from payment of a fee while operating within a radius of 25 miles from their home base, and that all private carriers when operating beyond the 25-mile zone, are required to pay the tax on such trips, there would be no just grounds for complaint on the ground of discrimination.

Coming now to the exemption of private carriers, operating within a twenty-five mile radius from the license and liability insurance requirements, we believe that the conditions justify the distinction made by this provision. The greater congestion of traffic and, consequently, the greater danger to the traveling public, is found upon highways that are most traveled. These are the improved through state highways. Those whose hauling operations are so limited as to keep them within the exemption will use the closest and most direct road which will generally be the county and township roads. Illustrations are the delivery trucks of the city merchants, delivering various commodities to their customers in the suburbs and trade territory. Those who have longer hauls find it to their advantage to seek an improved state highway, and so, make greater use of the improved and more heavily traveled highways.

Judge Kennemer, in his dissenting opinion in this case, quoted at page 40 of appellants' brief, considers the traffic and probability of danger to be as great or greater within a radius of twenty-five miles of a city or village

as outside. But we think it clear that the heavy traffic within such twenty-five mile limit is on the improved state highways, and is made up of those carriers who operate for greater distances. These properly come within the provision of the act and are required by the act to carry the liability insurance.

Another consideration is that in the event that private carriers, engaged in hauling their own property, within the limited area exempted by this provision, do cause injury to other users of the highway, they may ordinarily be subjected to an action for damages in the vicinity or county where the injury is caused.

We again refer to the rule that a state may direct its laws against what it deems an evil as it actually exists, without being obliged to cover the entire field of possible abuses. (Patone v. Pennsylvania, supra, and Hall v. Geiger-Jones, supra.)

In Silver v. Silver, 280 U. S. 117, the Court in speaking of the rights of the State, in placing regulatory provisions upon operators of motor vehicles, to secure the safety of the public, said:

> "In this day of almost universal highway transportation by motor car, we cannot say that abuses originating in the multiplicity of suits growing out of the gratuitous carriage of passengers in automobiles do not present so conspicuous an example of what the legislature may regard as an evil, as to justify legislation aimed at it, even though some abuses may not be hit. Carroll v. Greenwich Ins. Co., 199 U. S. 401, 411, 50 L. Ed. 246, 250, 26 Sup. Ct. Rep. 66; New York ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73, 73 L. Ed. 184, 189, 62 A. L. R. 785, 49 Sup. Ct. Rep. 61. It is enough that the present

statute strikes at the evil where it is felt, and reaches the class of cases where it most frequently occurs."

4. The exemption of "transportation of livestock and farm products to market by the owner thereof or supplies for his own use in his own motor vehicle."

Appellants' contention that the exemption of transportation of livestock and farm products to market by the owner, and the transportation of supplies for one's own use in his own motor vehicle, is entirely arbitrary and in violation of the Fourteenth Amendment, was refuted in the opinion of the trial court.

Again, it will be necessary to bear in mind the considerations, benefits and protections which the legislature had in mind when the act was passed, and to look into the motive which actuated the legislature when the exemption was made. The following rule is set out in Corpus Juris and supported by many authorities:

> "The courts will not declare a tax statute void as a violation of the equal protection guaranty so long as the classification or selection made by it is based on a reason, even though in their opinion the reason is a poor one and the statute itself is unjust." (12 C. J. 1152.)

At 12 C. J. 1153, the following statement is found:

> "As an incident to its power to select the persons and property to be taxed, a state may grant exemptions from taxes imposed by general laws; and such exemptions may be based on any reason that the legislature deems sufficient, with the limitation, however, that they must be founded on some reason and not on mere caprice."

One substantial justification for separate classification of the owner who hauls his own farm products and livestock to market is that in the very nature of things the amount of such hauling by any producer is bound to be limited. Nature does not permit of continuous harvesting and marketing, and such transportation must be limited by the production, and therefore only occasional. It is, so far as those exempted by this provision are concerned, a mere incident of the chief occupation of producing the crops and livestock.

It is clearly distinguishable from the continuous hauling in the business of distributing merchandise and the output of oil wells, mines and other industries. Furthermore, where the owner markets his own farm products and livestock, he commonly uses a nearby road and the haul is short. Where the hauling is for longer distances, as frequently is the case in marketing livestock, it is usually done by professional haulers, who are subject to the provision of the act.

It is contended that millers, commission men, and others, may go out and buy farm products and livestock and secure the benefit of this exemption, even though their operations become continuous and extensive. It is doubtful if the tax is of such consequence as to develop such a practice extensively, but if buyers of farm products do in the future, develop substantial and continuous carrying operations, the legislature can give the problem any necessary attention.

Appellants argue that the implement man and the filling station man, who deliver their implements and gaso-

line to the farmers, and the merchant who delivers his merchandise to his customers, are all incidental and casual users of the highways, and in approximately the same position as the seasonal, casual and incidental transportation of farm products. We do not take this view, but believe that all of these merchants operate a 365-day business and are hauling goods rather continuously; but be this as it may, these private carriers have already been exempted by the earlier city, village and twenty-five mile radius provisions. So appellants' point is not well founded.

Another consideration that has already been mentioned in respect to the twenty-five mile radius exemption is that those engaged in the transportation of their own farm products and livestock are as a general rule contributors to local taxes for highway use.

In Alward v. Johnson, 282 U. S. 509, the Court, in speaking of the general power of a state to classify her property for taxation, and to lay an appropriate tax upon each class, said:

> "It is not possible for us to say that the circumstances of the present cause disclose any arbitrary or unreasonable exertion of such power by the state. The distinction between property employed in conducting a business which requires constant and unusual use of the highways and property not so employed is plain enough. Here the tax laid was exclusive of all other taxation and the funds arising therefrom were assigned to the maintenance of roads, essential to petitioner's operations."

Statutes exempting farmers hauling their own agri-

cultural products to market have been before the courts in a number of cases, and have generally been held valid.

> "No doubt very considerable restrictions might be imposed upon farmers as to the manner of conducting their trade; but while the public authority can restrict them in that respect, it is not obliged to do so as a condition of taxing other persons on their business or avocations." (Davis v. Mayor, etc., of Macon, 64 Ga. 128.)

The 1925 Oregon Motor Carrier Act provided for a 50 per cent additional license fee on commercial motor vehicles used upon the public highways. Among the exemptions, included in the act, was one which exempted vehicles used in delivery to market of the products of husbandry by the owner and grower thereof. In State v. Kozer, 116 Ore. 581, the Oregon Supreme Court justified this exemption on the ground that such transportation was merely incidental to farming operations and did not involve such use of the highways as to justify a greater license fee. The court, at page 590 of its opinion, said:

> "We can readily appreciate that the classifications which this statute makes will in certain isolated cases cause the payment of a tax disproportionate to the damage resulting to the highways, but the constitutionality of the law must not be so tested. We must consider its general application to the classes affected, and not to certain individuals belonging to such classes. Exact equality is not possible. Practical equality is constitutional equality. The human mind has not yet been able to devise any scheme of taxation which will operate with unerring certainty and equality to all situations that may arise." (Southwestern Oil Co. v. Texas, 217 U. S. 114, 54

L. Ed. 688, 30 S. Ct. Rep. 496. See also, Rose's U. S. Notes E: Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, 33 L. Ed. 892, 10 S. Ct. Rep. 533.)

On page 592, the Court stated further:

> "In this state, motor vehicles used for agricultural purposes are subject to all of the general provisions of the motor vehicle laws, but are exempted from payment of the additional tax for the reason, no doubt, that the legislature was of opinion that 'delivery to market of the products of husbandry by the grower and owner thereof', was merely incidental to farming and that the highways of the state would not be subjected to such a use as would justify a greater license fee."

A Georgia act of 1927 imposed—

> "Upon every person, firm or corporation, engaged in the operation of motor-trucks or trailers for the transportation of freight for hire, $25 for each truck or trailer. Provided, this section shall not apply to persons, firms or corporations hauling farm produce, live stock, and fertilizers exclusively."

The Georgia Supreme Court in its opinion discussed generally the power of the legislature to classify and subclassify, and the general rules applicable thereto, but did not discuss particular reasons why the above exemptions came within the rules.

The court did hold the exemption not unreasonable and not in violation of the due-process clause of the Georgia constitution or the due-process clause of the fourteenth amendment to the federal constitution. Upon the exemption mentioned, the court merely said:

> "The exemption of persons and corporations engaged exclusively in hauling farm produce, livestock and fertilizers, is not unreasonable or arbitrary." (State v. LeFebvre, 174 Minn, 248, 219 N. W. 167; Davis v. Mayor, etc., City of Macon, 64 Ga. 128, 37 Am. Rep. 60.) (Southern Transfer Co. v. Harrison, [Oct. 17, 1930] 171 Ga. 358, 155 S. E. 338.)

In an Iowa case, upholding an Iowa statute, imposing a ton mileage tax on common-carrier vehicles, while not imposing such tax upon vehicles of private carriers, the court said in respect to the different classification of common carriers:

> "We may take judicial notice that commercial motor vehicle transportation and highway maintenance expense, resulting therefrom, is rapidly increasing, and that traffic on the main highways is becoming more and more congested. It is not an unreasonable classification for the legislature to make a distinction between those common carriers whose use of the highway is regular, and hence more frequent, and whose operation is attended with great danger of life and property and great damage to the highways, and those carriers whose use of the highways is only occasional and spasmodic. Such a distinction does not constitute an arbitrary discrimination, provided that the state of facts is sufficient to sustain the classification." (See Liberty Highway Co., et al. v. Michigan Utilities Commission, et al., [S. C.] 294 F. 703, with cases cited.) (Iowa Motor Vehicle Assn. v. Board of Railroad Commissioners, 207 Iowa 461, 221 N. W. 364.)

The Iowa decision was affirmed by the United States Supreme Court, January 6, 1930, in a *per curiam* opinion as follows:

"Decree affirmed upon the authority of Bekins Van Lines v. Riley, 280 U. S. 80, 74 L. Ed. 178, 50 S. Ct. 64." Iowa Motor Vehicle Assn. v. Board of R. R. Comm'rs, 280 U. S. 529, and 4 L. Ed. 595, 59 S. Ct. 151.)

In State v. LeFebvre, 174 Minn. 248, 219 N. W. 167, the court held that a highway tax statute was not invalid—

> "In excluding those engaged exclusively in transporting farm products from the point of production to the primary market, nor in excluding those transporting or delivering dairy products." (Syl. 4.)

Regarding the propriety of these classifications, the Court said:

> "The exemption of transportation companies engaged exclusively in transporting agricultural, horticultural, dairy or other farm products from the point of production to the primary market, and motor vehicles used exclusively in transporting or delivering dairy products is not unreasonable nor arbitrary. *** the legislature might conclude that the conditions surrounding the transportation of agricultural and dairy products from the point of production so differ from ordinary common carrier transportation that a certificate of public convenience and necessity should not be required. Favoritism might have been intended but we do not assume it nor find it. The classification seems on a fair basis."

Insofar as the exemptions of those hauling livestock and farm products to market from the regulatory features of the act is concerned, the legislature must have had in mind the incidental and occasional use of the highways that we have already referred to. Presumably

such use appeared not to be of such moment as to justify the imposition of the insurance policy requirement or to merit the large amount of administrative effort that would be required to enforce the safety regulation of the commission.

We believe that this exemption is also subject to the rule that a state may direct its laws against what it deems an evil, as it actually exists, without covering the whole field of possible abuses. (Patsone v. Pennsylvania, supra; also Hall v. Geiger-Jones, supra.)

The right of the Legislature to make class exemptions because of incidental use of the road, was given specific consideration in a case in which an attack was made on the Wisconsin law. The Court held:

> "Wisconsin Laws 1923, Ch. 320, prescribing legislation for motor vehicles, is not subject to objection that it is class legislation, on the grounds that tractors hauling agricultural equipment are exempt; the use of roads by such tractors being incidental merely." (State v. Zimmerman, 181 Wis. 552.)

5. The exemption of transportation of children to and from school.

It would not appear that there could be any serious objection to the exemption as to the transportation of children to and from school. This is a public function, performed at public expense. The state is not required to tax one of its own agencies. Such public agency can fairly be exempted from taxation for the same reason that municipal property and bonds are.

It would also appear that the question of safe opera-

tion of such vehicles can be properly left to the school authorities who are directly responsible therefor. On page 45 of appellants' brief, the following statement is found:

> "This exemption was held constitutional by the court in this case, and in Louis v. Boynton, l. c. 473. In this case the following reasons are given, l. c. 352:
>
> > 'Nor can there be any serious question about the exemption as to the transportation of children to and from schools. This public agency can be fairly exempted from taxation for the same reason that municipal bonds are; the question of the safe operation of such vehicles can be properly left to the school authorities, who are directly responsible therefor.'
>
> "The court, however, in passing upon this exemption has considered it only from the standpoint of a revenue measure, and it has overlooked the public safety provision which in the case of children is even more important than that of adults."

The appellant appears to be satisfied by the court's reason for holding the tax exemption valid. The statement, however, that the court overlooks the public safety provision would appear to be erroneous. The last sentence set out in the above quotation from the opinion of the Louis v. Boynton case, covers the public safety provision with the statement that the question of the safe operation of such vehicles can be properly left to the school authorities who are directly responsible therefor.

The question of the exemption of carriers engaged ex-

clusively in the transportation of children to and from school was before the Supreme Court of Minnesota in State v. LeFebvre, 174 Minn. 248, 255. The court said:

> "The exemption of carriers engaged exclusively in the transportation of children to and from school is not unreasonable or arbitrary. School busses are not common carriers within the meaning of the statute. They convey children in certain localities to certain schools and are operated by the districts and under contract with them."

A similar contention was overruled in Smallwood v. Jeter, 42 Idaho 169, 244.

6. Do Sections 2, 17, 19, 23 and 24 impose obligations upon appellants to which the State had no constitutional authority to subject them, or fail to define such obligations with a fair degree of certainty?

On page 46 of their brief appellants contend that Sections 2, 17, 19, 23 and 24, taken in conjunction with the entire act, impose upon the appellants obligations and duties which the State had no authority to subject them to, or else said sections fail to define such obligations with a fair degree of certainty which is required of criminal statutes.

Section 17 of the Act is simply a provision for the collection of the tax. It places a penalty equal to one and one-half per cent per month for delinquency in the payment of the tax, and provides means of levy on the property of the carrier if the tax is not paid. There is nothing ambiguous about this section and most certainly if the State has the right to levy the tax it has

the authority to provide proper means for its collection.

Section 19 of the Act provides that failure on the part of a carrier to comply with the provisions of the Act, or to give the Commission access to its books or records, constitutes a misdemeanor. The ownership and financial condition of the carrier is material to the Commission in connection with the collection of the tax. If the tax is to be collected some books and accounts must be kept by the carrier, which will reflect the mileage of their trucks. The legislature has power to authorize the Commission to require such bookkeeping and such reports as will show the mileage of the trucks, and it would certainly follow that the Commission had authority to examine the books and records so kept for the purpose of checking the accuracy of the reports filed by the carriers and determining the correct amount of the tax.

In connection with examination of the books and records, section 19 goes no further than to place a penalty upon the carrier for refusal to give access to this necessary information. There could be nothing ambiguous about this section of the law.

Section 23 of the Act simply makes violation of its provisions or of the regulations of the Commission a misdemeanor, and Section 24 provides the manner of prosecution.

The appellants further contend that it is impossible from the language of the act to determine the extent of the exemptions under Section 2. Their first objection is that it is impossible for them to determine whether

they are free from tax only in the city or village where their plant is located or in any city or village in which they operate. Section 2 of the Act provides as follows: "This act shall not apply to motor carriers who shall operate wholly within any city or village of this state." We can see no ambiguity in this section. When a carrier leaves the city in which his business is located and operates through rural territory or other cities it is not operating wholly within "any city or village," and its passage through such other cities or villages is incidental to the traffic on the main highway from city to city.

7. Powers given public service commission by Sections 5, 8, 16, 17, 19, 22 and 23.

Appellants, under this heading, refer to the provisions requiring private carriers of property to obtain a license and to make their books and records available to the inspection of the Commission, providing for payment of fees, and penalties in certain cases, authorizing revocation of licenses, making violations of the provisions of the act and of regulations of the Commission, a misdemeanor, and providing penalty therefor. But the chief attack of the appellants is upon Section 5 of the act, which is printed upon page 51 of their brief.

The first sentence of Section 5 deals solely with public carriers, and gives the Commission power to fix their rates and classifications. The second sentence refers to public, contract and private motor carriers of property. It reads as follows:

"And the Public Service Commission is hereby

> vested with power and authority, and it shall be its duty to license, supervise and regulate every public motor carrier of property or of passengers, contract motor carrier of property or of passengers, and private motor carrier of property in the state, and to regulate and supervise the accounts, schedules, service and method of operation of same; to prescribe a uniform system and classification of accounts to be used; to require the filing of annual and other reports and any other data; and to supervise and regulate 'public motor carriers of property or of passengers', 'contract motor carriers of property or of passengers' and 'private motor carriers of property', in all matters affecting the relationship between such 'public motor carriers of property or of passengers', 'contract motor carriers of property or of passengers', and 'private motor carriers of property', and the traveling and shipping public." (R. 13)

In the sentence quoted above, the Commission was given the power to secure full information upon which to determine the amount of the tax for which the various carriers are liable.

We think a fair construction of it will authorize only such requirements on the part of the Commission as are necessary to effect this purpose. We see in this provision no intent on the part of the Legislature to authorize the Commission to subject private carriers to the duties and regulations which, under the law, can be imposed only on common carriers. Appellants make no complaint of the Commission having taken any objectionable action under this provision. And in the event that the Commission should make any unconstitutional requirement, then the invalidity would be of regulation and not of statute.

The third sentence of said Section 5 authorizes the Commission, by general order or otherwise, to prescribe necessary rules and regulations covering all motor carriers. Clearly this authorizes only such rules and regulations as are necessary to carry out the intention and purpose of the act, and affords no basis for anticipation that the Commission will make rules and regulations violating appellant's constitutional rights.

Appellants' chief complaint as to Section 5 is based on the fourth and last sentence thereof, which reads as follows:

> "All laws relating to the powers, duties, authority and jurisdiction of the Public Service Commission over *common carriers* are hereby made applicable to all *such motor carriers* except as herein otherwise specifically provided." (R. 13, italics ours.)

Appellants cite several works on grammar as authority for construing this provision to subject private and contract carriers, as well as public motor carriers, to all laws of the state affecting common carriers. This would be a drastic and far-reaching construction indeed, and should be arrived at only in the event the language used compels such construction. We think this sentence covers its own separate sphere, and that the rule of last immediate antecedent is applicable. In other words, that the word "such" in the line before the last, refers to "common carriers" as its antecedent, and makes the common carrier law applicable to such motor carriers as are actually common carriers. This was the construction adopted by the trial court. It makes a reasonable

and sensible provision, and in our judgment, is clearly entitled to be adopted, rather than the one which would have the effect of invalidating either the entire act or a part of the act.

We think this statute comes well within the rule that where a statute is reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority. (Plymouth Coal Co. v. Pennsylvania, 232 U. S. 531.)

In United States v. Ryan, 76 L. Ed. 71, the Court, in speaking of the proper manner of construing a statute, said:

> "All laws are to be given a sensible construction. A literal application of a statute, which would lead to absurd consequences, is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose."

It appears to appellees that the carriers should have no difficulty in determining whether they are operating wholly within a city, in which their business or base is located, or whether they are leaving such local base and operating principally upon the highways of the state but incidentally in other cities, through which they may happen to pass.

Appellants' next objection is that they are unable to determine, under the twenty-five mile exemption provided

for in Section 2, whether a radius of twenty-five miles beyond the corporate limits of any such city or village is absolutely free from taxation or becomes a taxable radius when the motor vehicle goes to some point beyond the twenty-five mile radius, and then whether or not only the mileage outside of the twenty-five mile radius is taxable, or whether the entire mileage covered by the motor vehicle, on its entire trip, is taxable. The first phrase under Section 2, exempts all carriers who operate wholly within the city limits. The second phrase "or private motor carriers who operate within a radius of twenty-five miles beyond the corporate limits of such city, or any village", was drawn in favor of the local private carrier, who operates within the twenty-five mile zone, outside the city in which its business is located.

As to this exemption, the court below stated:

> "It is also to be observed that the phrase uses the expression 'within a radius'. The use of the word 'radius' indicates a center. That center must be the city. What city? The statute says 'such city'. 'Such' refers back to motor carriers 'who operate wholly within any city'. We think a fair construction of the statute is that there is exempted private carriers who have an established place of business within a city, be they resident or non-resident, and who use that city as a center of the operations of that vehicle."

There appears to be no particular difficulty presented by the language of the statute in arriving at this construction. Appellants in asserting inability to construe this statute state: "Should appellants fail to construe the provisions of this act, they are subject to arrest and

prosecution". They base this contention principally upon Smith v. Cahoon, supra. In that case, appellant had been arrested for operating his truck without a license. When the appellant was arrested, the statute had not been construed. The question to be determined was whether or not the appellant could be restrained of his liberty for violating the statute, the terms of which were obscure, and which had not been construed by the courts. In releasing the appellant in the Smith v. Cahoon case, the Supreme Court said: "It should be observed that this is not an action in equity, where the enforcement of the statute awaits the final determination of the court as to validity and scope". The Supreme Court further stated that: "until such separation has been accomplished by judicial decision, the statute remains uncertain".

The present case is an action in equity, where the enforcement of the statute awaits the construction of the court. The provisions of the Kansas statute are not so hopelessly intermingled as those of the Florida act, and the statute has now been construed. The appellants have not been arrested or deprived of their liberty. The construction placed upon the law by the court, if followed by the appellants, eliminates any question of their future arrest because of misconstruction of the statute. After a statute has been clearly construed by a court, the objections raised by appellants are without merit. For these reasons we do not believe that the rule stated in the Smith v. Cahoon case applies here.

8. The provisions of Section 21 requiring a liability insurance policy conditioned to pay compensation to injured persons or damage to property resulting from negligent operations.

It is our opinion that this section is not intended to protect passengers or cargo carried. The provision is only intended to protect third persons from injuries to their person or property, and to guarantee compensation therefor for such injuries incurred by reason of the negligence of the carrier. This construction is the more reasonable because the construction contended for by appellants could not lawfully be applied to the transportation of goods or passengers by appellants' private carriers, or by contract carriers for hire, who are not common carriers, or by carriers of interstate commerce. It would be an unreasonable construction indeed to require private carriers to carry insurance to indemnity themselves for damages to their own goods by their own negligence.

If Section 21 is construed as imposing liability insurance requirements for the protection of third persons for injuries to their person or property, and not to the passengers and cargo carried, the requirement is valid. (42 C. J. 710: Re Opinion of the Justices, 81 N. H. 566.) So construed, this liability insurance provision does not in any sense discriminate against appellants, since the various exemptions provided by the act are justified for the same reasons as have been heretofore discussed.

V.

CONCLUSION.

Appellees respectfully submit, in conclusion, that Chapter 236 of the Laws of Kansas 1931, is a valid exercise of the State's power to control the use of the State's highway system; that the classification of carriers found in the act has a reasonable and logical basis in connection with the purposes sought to be accomplished; that because of the dissimilarity of the two statutes, this case is not controlled by Smith v. Cahoon; and that the decree of the court below should be affirmed.

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